No. 328

Supreme Court of the United States

OCTOBER TERM, 1942.

ESTATE OF W. M. L. FISKE, DECEASED, CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petitioner, Estate of W. M. L. Fiske, Deceased, Central Hanover Bank and Trust Company, Executor, by its counsel, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above-entitled cause on May 23, 1942.

Opinions Below.

This cause originated by the filing of a petition in the United States Board of Tax Appeals to review the determination of the Commissioner of Internal Revenue that there was a deficiency in the income tax of the petitioner's decedent for the calendar year 1936. The opinion of the

Board of Tax Appeals redetermining the deficiency is reported in 44 B. T. A. 227 (Record, p. 11).

The respondent appealed from the decision of the Board of Tax Appeals to the Circuit Court of Appeals for the Seventh Circuit. The opinion of the Circuit Court of Appeals is reported in 128 F. (2d) 487 (R. 34).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 23, 1942 (R. 42). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended, 43 Stat. 938, U. S. C., Title 28, Section 347. The petition is timely under U. S. C., Title 28, Section 350.

Questions Presented.

The ultimate issue presented is whether the salary of the petitioner's decedent (hereinafter sometimes referred to as the taxpayer) for 1936 was subject to United States income tax or whether such salary was exempt from tax under Section 116 (a) of the Revenue Act of 1936. The salary was not subject to tax if (1) the taxpayer was "a bona fide non-resident of the United States for more than six months during the taxable year" within the meaning of Section 116 (a) of the Revenue Act of 1936 and (2) the salary was income "from sources without the United States" within the meaning of Sections 116 (a) and 119 (c)(3) of the Revenue Act of 1936.

The following questions of law involving the construction of the aforementioned statutory provisions are presented:

(1) Whether the taxpayer who lived in France during the entire period 1925 to 1940 lost his status

as "a bona fide non-resident of the United States for more than six months during the taxable year" as to the year 1936 solely because of the fact that he was physically present in the United States during the entire year 1936, having been unavoidably detained in the United States during the entire year 1936 on account of illness.

(2) Whether it is necessary to the taxpayer's case that the services performed by the taxpayer outside of the United States, for which the taxpayer was paid his salary in 1936, be performed during the taxable year 1936.

Statute and Regulations Involved.

The relevant portions of the Revenue Act of 1936 are set forth in the Appendix. There are no pertinent regulations.

Statement of Facts.

The taxpayer was a Vice-President of Dillon, Read & Co. and since 1924 had been in charge of the company's Paris office (R. 11, 12). In December, 1935, he came to this country to spend a holiday with his children, was taken critically ill and was unable to return to his home and work in Paris until March of 1937 (R. 12, 13). Thereafter he stayed at his post in Paris until May, 1940, when he was forced to leave because of the German invasion (R. 13). Throughout the period of his prolonged, fifteen months' illness in this country the company continued his salary (R. 13). His salary so paid for 1936 was $37,400 (R. 13).

The Commissioner elected not to include the testimony and the exhibits as part of the Record. The Board's Findings of Fact are set forth in the Record beginning at page 11. The Board found as a fact that "the petitioner was a bona fide non-resident of the United States during all of the calendar year 1936" (R. 14).

Reasons for Granting the Writ.

I. The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Muhleman* v. *Hoey,* 124 F. (2d) 414, decided January 8, 1942 (no petition for certiorari filed), and contrary to the doctrine of *Lucas* v. *Ox Fibre Brush Co.,* 281 U. S. 115, in holding that the salary was not an "amount(s) received from sources without the United States" within the meaning of Sections 116(a) and 119(c)(3) of the Revenue Act of 1936.

II. The decision of the Circuit Court of Appeals on the question of residence is in conflict with *Penfield* v. *Chesapeake, etc.,* 134 U. S. 351, and perhaps also in conflict with *Texas* v. *Florida,* 306 U. S. 398, and *District of Columbia* v. *Murphy,* 314 U. S. 441.

III. The Circuit Court of Appeals decided two important questions of federal law (stated *supra* under "Questions Presented"), which have not been, but should be, settled by this Court.

IV. The Circuit Court of Appeals erred in its decision.

Conclusion.

WHEREFORE, for the reasons stated above and discussed more fully in the annexed brief, your petitioner prays that a writ of certiorari be issued out of and under the seal of this honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, to the end that the above cause may be certified to and reviewed and determined by this Court as provided in Section 240 of the

Judicial Code, as amended, 43 Stat. 938 (U. S. C., Title 28, Section 347), and that the judgment of the said Circuit Court of Appeals in the above-entitled cause, and every part thereof, may be reviewed by this Court, and your petitioner prays for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1942.

Estate of W. M. L. FISKE, Deceased, Central Hanover Bank and Trust Company, Executor,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The citations of the opinions below, the basis of the jurisdiction of this Court, and the questions presented are set forth in the attached Petition, and are therefore not repeated here.

Specifications of Error.

The United States Circuit Court of Appeals erred:

(1) In holding that the taxpayer was not "a bona fide non-resident of the United States for more than six months during the taxable year" within the meaning of Section 116(a) of the Revenue Act of 1936;

(2) In holding that the salary was not an "amount(s) received from sources without the United States" within

the meaning of Sections 116(a) and 119(c)(3) of the Revenue Act of 1936;

(3) In holding that the taxpayer was subject to United States income tax on the salary paid to him in the year 1936; and

(4) In reversing the decision of the United States Board of Tax Appeals.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Muhleman* v. *Hoey, supra,* and contrary to the doctrine of *Lucas* v. *Ox Fibre Brush Co.,* 281 U. S. 115, in holding that the salary was not an "amount(s) received from sources without the United States" within the meaning of Sections 116(a) and 119(c)(3) of the Revenue Act of 1936.

The decision below apparently decided this question against the taxpayer solely on the ground that the statutory provisions should be construed as requiring that the services performed without the United States be "during the taxable period" (R. 38). The majority opinion stated (R. 38):

> "It is clear before the respondent may claim as exempt the amount received by Fiske, the income must be 'for personal services performed without the United States during the taxable period' and the burden of proving that fact devolved upon the respondent."

On the other hand, the *Muhleman* case, *supra,* held that it was immaterial that the services were rendered by the

taxpayer in a year prior to the taxable year. In the *Muhleman* case, the taxpayer was the London representative of the American Tobacco Company from October 1928 through July 1931. For his services performed in England in 1931, he became entitled to a bonus which he did not receive until 1932 after he had returned and reestablished his residence in the United States. The statutory provisions applicable to 1932, the taxable year involved, were identical with those involved in the present case. The taxpayer in that case, as in the present case, made his returns on a cash basis. The taxpayer in that case, as in the present case, received the funds from an American company while he was in the United States. The court said (at pp. 414, 415):

> "This amount was paid to him in this country by the American Tobacco Company during 1932 for his services performed in 1931, while a resident of London, Eng., as the manager of its foreign subsidiaries.
>
> * * * * * *
>
> "Sec. 116(a) of the Revenue Act of 1932 exempts from gross income in the case of an individual citizen of the United States who is a bona fide non-resident of this country for more than six months during the taxable year 'amounts received from sources without the United States (except amounts paid by the United States or any agency thereof), if such amounts would constitute earned income.' Sec. 119(c)(3) of the 1932 Act, 26 U. S. C. A. Int. Rev. Code, §119(c)(3), provides that compensation for personal services performed without the United States shall be treated as income from sources without the United States.
>
> "It is plain, therefore, that the above amount received by Mr. Mower was, under the statute, income from sources without the United States and excluded

> from his gross income provided he was a bona fide non-resident of this country during the taxable year. * * *"

The Court went on to hold that the taxpayer was subject to United States income tax because during the taxable year 1932, the year in which he received the compensation, he was not a bona fide non-resident of the United States for more than six months.

In *Lucas* v. *Ox Fibre Brush Co., supra,* this Court held that an amount paid by the taxpayer as extra compensation for services rendered in prior years was deductible by the taxpayer in the year of payment as "compensation for personal services actually rendered". It is submitted that the decision below may be in conflict with that decision or at least may be contrary to the general principles stated therein as to the treatment, for income tax purposes, of compensation for services rendered in a prior year.

II.

The decision of the Circuit Court of Appeals on the question of residence is in conflict with *Penfield* v. *Chesapeake, etc.,* 134 U. S. 351, and perhaps also in conflict with *Texas* v. *Florida,* 306 U. S. 398, and *District of Columbia* v. *Murphy,* 314 U. S. 441.

The Circuit Court of Appeals held that in determining whether the taxpayer was "a bona fide non-resident of the United States for more than six months during the taxable year", the sole consideration was whether the taxpayer had actually been outside of the United States for more than six months during the taxable year. The court appears to have relied at least in part upon three decisions of this

Court, *Penfield* v. *Chesapeake, etc., supra; District of Columbia* v. *Murphy, supra;* and *Texas* v. *Florida, supra.* The pertinent portion of the majority opinion is as follows (R. 37):

> "Residence is the place of abode, whether permanent or temporary, *Penfield* v. *Chesapeake etc.,* 134 U. S. 351, 356, 357, a physical fact, *Matter of Newcomb,* 84 N. E. 950, 954, and means where a man abides or lives, *Hunter* v. *Bremer,* 100 Atl. 809, 811, and so applying the tests enumerated in the cases cited, we believe that Congress was not concerned with the question where a taxpayer had his permanent residence, but rather intended the Act to apply to any American citizen actually outside of the United States for more than six months during the taxable year, engaged in the promotion of American foreign trade, and it is no answer to say that it was at all times Fiske's intention to return to Paris and that he was prevented from carrying out this intention because of illness. Cf. *District of Columbia* v. *Murphy,* 314 U. S. 441. See also *Texas* v. *Florida,* 306 U. S. 398, 424, 425."

It is submitted that, except for the decision below, no case, from the field of taxation or otherwise, supports the proposition that the word "residence" means physical presence alone. It is submitted that no one of the three decisions of this Court cited in the passage just quoted supports any such proposition. The dissenting opinion below said (R. 39):

> "The recent cases of *Texas* v. *Florida,* 306 U. S. 398, and *Dist. of Columbia* v. *Murphy,* 314 U. S. 441, tend to support rather than contradict the Board's decision.

The dissenting opinion then analyzed these decisions of this Court and discussed their application to the instant

facts. This entire discussion in the dissenting opinion is incorporated herein by reference (R. 39-41).

In *Penfield* v. *Chesapeake, etc., supra,* the question was whether the plaintiff was a "resident" of New York within the meaning of the New York Statute of Limitations. This was an action in the Federal Court in New York to recover damages for personal injuries sustained in an accident in Tennessee on November 30, 1882. The plaintiff had lived in New York until he was 14, when he moved to Michigan, then to Illinois and then to St. Louis. At the time of the accident plaintiff was a travelling salesman living in St. Louis with his wife and children. The Statute of Limitations was a bar to this action unless plaintiff became a resident of New York prior to December 1, 1883. Plaintiff contended that he acquired residence in New York prior to December 1, 1883 by virtue of the fact that his wife and children with his consent moved to New York in October, 1883, where they took up their residence and had continued to live until the time of the trial. Plaintiff himself did not come to New York until some time in December, 1883. The court assumed that plaintiff's intentions were such that he had obtained a domicile in New York by virtue of his family, with his consent, having made their home in New York. However, the court held that the plaintiff did not become a resident of New York prior to December 1, 1883 merely by sending his wife and children to New York to live, in view of the fact that plaintiff himself did not go to New York until after that date. The opinion indicates that considerable reliance is being placed upon decisions of the New York courts.

It is submitted that *Penfield* v. *Chesapeake, etc.,* is not authority at all in point in the instant case and that the Circuit Court of Appeals erred in relying upon it. That case simply stands for the proposition that a taxpayer

cannot *become* a resident of a state until he has physically been present there.

In *Texas* v. *Florida, supra,* this Court determined the domicile of a decedent for purposes of state estate and inheritance taxes. In *District of Columbia* v. *Murphy, supra,* the question was as to the domicile of the taxpayer for purposes of the District of Columbia income tax. Neither case involved facts at all similar to those in the instant case. In each case the opinion of this Court laid down general principles as to the determination of domicile. It is submitted that the opinions in those two cases support the position of the taxpayer rather than that of the Government. It is submitted that the decision below was in error to the extent that it was rested upon a construction of the opinions in those two cases and upon the application to the instant case of the general principles as to domicile stated in those two opinions. The majority opinion below cited particularly pages 424 and 425 of the opinion in *Texas* v. *Florida.* Presumably the reference was to the following passages at said pages 424 and 425:

> "Residence in fact, coupled with the purpose to make the place of residence one's home, are the essential elements of domicile. * * * While one's statements may supply evidence of the intention requisite to establish domicile at a given place of residence, they cannot supply the fact of residence there; *Matter of Newcomb, supra,* 250; *Matter of Trowbridge,* 266 N. Y. 283, 292; 194 N. E. 756; and they are of slight weight when they conflict with the fact."

The majority opinion below thought that the term "resident" in Section 116(a) referred to mere residence as distinguished from domicile. The dissenting opinion thought that it referred to domicile. If it is to be interpreted as

referring to mere residence as distinguished from domicile, then it is submitted that the decision below is probably in conflict with the decision of this Court in *Penfield* v. *Chesapeake, etc., supra,* or that at least the Circuit Court of Appeals, in relying upon *Penfield* v. *Chesapeake, etc.,* misread its teaching and improperly extended its authority. *Penfield* v. *Chesapeake, etc.,* merely held that physical presence at *some* time is necessary and that, therefore, one cannot *become* a resident of a state until he actually sets foot in that state. It is submitted that *Penfield* v. *Chesapeake, etc.,* should not be extended to the instant situation and treated as authority for the proposition that "residence" depends solely upon physical presence. To the extent that *Texas* v. *Florida* and *District of Columbia* v. *Murphy* were relied upon by the Circuit Court of Appeals, it is submitted that the Circuit Court of Appeals also misread their teaching and improperly extended their authority.

If "residence" is to be interpreted as referring to domicile, then it is submitted that the decision below is probably in conflict with the decisions of this Court in *Texas* v. *Florida* and *District of Columbia* v. *Murphy, supra,* or that at least it is contrary to the general principles as to domicile enunciated in the opinions in those two cases.

III.

The Circuit Court of Appeals decided two important questions of Federal law (stated *supra* under "Questions Presented") which have not been, but should be, settled by this Court.

The statutory provisions interpreted by the Circuit Court of Appeals, Sections 116(a) and 119(c)(3) of the Revenue Act of 1936, are, and for many years have been,

important provisions of the Federal income tax statute. These provisions have been contained in the Federal income tax statute since 1926* in substantially the same phraseology. They are now incorporated in the Internal Revenue Code as Sections 116(a) and 119(c)(3) thereof.

Surely an authoritative decision by this Court upon the two questions presented (stated *supra* under "Questions Presented") would relieve many taxpayers of uncertainty as to their tax status and would facilitate the administration of the internal revenue laws by the Bureau of Internal Revenue.

IV.

The Circuit Court of Appeals erred in its decision.

A. The Circuit Court of Appeals erred in holding that the salary was not income "from sources without the United States" within the meaning of Sections 116(a) and 119(c)(3) of the Revenue Act of 1936.

The majority opinion does not explain why it is necessary to the taxpayer's case that the services performed without the United States be "during the taxable period". It is possible that the majority opinion was handed down under a misapprehension as to the wording of the pertinent statutory provisions since the majority opinion stated (R. 38):

> "It is clear before the respondent may claim as exempt the amount received by Fiske, the income must be 'for personal services performed without the United States during the taxable period,' and the burden of proving that fact devolved upon the respondent."

The quoted phrase "for personal services performed without the United States during the taxable period" is not

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* The statute contained the provision now numbered Section 119(c)(3) even prior to 1926.

an accurate quotation from any pertinent statutory provision or from any opinion cited in the majority opinion. This is pointed out in the following passage from the dissenting opinion in the Circuit Court of Appeals, which demonstrates, it is submitted, that the majority opinion was in error on this question (R. 41):

> "It must be true that the income received by respondent in 1936 was not for personal services rendered either in the United States or France during that year. This is evident from the fact that he was ill during that entire period. The opinion, so I think, erroneously interprets the applicable provision to require that the services performed without the United States be 'during the taxable period.' These words do not appear in the Statutory provision and it has been expressly held in *Muhleman* v. *Hoey,* 124 F. (2d) 414, 415 [42-1 U. S. R. C., Par. 9203], that it is immaterial whether or not the services were rendered during the year for which the income was earned.
>
> "Petitioner is in a precarious situation. He dare not argue that the money received by respondent was a gift, as that would make it exempt. He merely argues that no services were rendered for which the money was received. In my judgment, the Board logically disposed of petitioner's contention in this respect as follows:
>
> > " '* * * Although the decedent was away from his place of business and was too ill to perform his duties during 1936, nevertheless, he had rendered services in the past, he was expected to continue to render services in the future, and his employer continued his salary during his illness. *Cf. Lucas* v. *Ox Fibre Brush Co.,* 281 U. S. 115 [2 U. S. T. C., Par. 522]. His place of employment was in France. He served the company only by rendering personal services. Apparently, the decedent had developed an office organization and a clientele for his employer so that the business could go on even in his absence. His

> employer wanted to hold him as an employee. It is difficult to draw any other conclusion from the fact that the employer paid him the $37,400 in 1936. * * *' "

The opinion of the Board of Tax Appeals (by Member Murdock, the Member who heard the testimony) stated (R. 19, 20):

> "His business was in France, not here. The income was earned as a result of services performed outside the United States. * * *
>
> "* * * We conclude that the amount in question was paid to the decedent as compensation for personal services actually rendered outside of the United States."

It is submitted that the Circuit Court of Appeals should not have disturbed the decision by the trier of fact. The Commissioner elected not to include the testimony and the exhibits as part of the record on appeal.

This case was reviewed by the entire Board and only Member Smith dissented. Thus, the vote of the Board of Tax Appeals on each of the two questions presented was 15 to 1 in favor of the taxpayer. The vote in the Circuit Court of Appeals on each of the two questions presented was 2 to 1 in favor of the Commissioner. The majority opinion below was written by Kerner, C. J. Minton, C. J., concurred. The dissenting opinion was by Major, C. J.

B. The Circuit Court of Appeals erred in holding that the taxpayer was not a bona fide non-resident of the United States for more than six months during the taxable year "within the meaning of Section 116(a) of the Revenue Act of 1936".

The Board specifically found (R. 14):

> "The petitioner was a bona fide non-resident of the United States during all of the calendar year 1936."

To the extent that this represented a finding of fact by the Board it was not open to review before the Circuit Court of Appeals. The record of the testimony and exhibits were not before the Circuit Court of Appeals. The only proposition open for argument was the bold theory that, as used in the statute, "residence" meant physical presence as a matter of law and regardless of intention, circumstances or reasons. If intention, circumstances, nature of the stay or any similar factors were to be considered and weighed, the Commissioner was bound by the Board's finding of fact.

The majority opinion below apparently was rested solely on the construction of the statutory provision "a bona fide non-resident of the United States for more than six months during the taxable year" as meaning only a person actually outside of the United States for more than six months during the taxable year.

It is submitted that the majority opinion below erred in holding that "residence" means, as a matter of law, "physical presence" alone. Such a construction completely disregards the words "bona fide" used in Section 116(a). The fact that the word "non-resident" is modified by the adjective "bona fide" establishes that various factors, such as intention or purpose, must be taken into consideration. Physical presence is an absolute fact; it is impossible for such a fact to be bona fide or not bona fide.

It is submitted that no case, from the field of taxation or otherwise, supports the proposition that the word "residence" means physical presence alone.* Under Point II, *supra,* it has been pointed out that neither of the three

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* As pointed out *supra,* the decision of this Court in *Penfield* v. *Chesapeake, etc.,* merely holds that physical presence at *some* time is necessary and that therefore one cannot *become* a resident of a state until he actually sets foot in that state.

decisions of this Court cited in the majority opinion below supports such a proposition.

This contention appears to have been made by the Commissioner of Internal Revenue in only one previous case, which also involved Section 116(a) of the Revenue Act. *Carstairs* v. *United States,* United States District Court for the Eastern District of Pennsylvania (decided January 16, 1936 and not officially reported*), no appeal taken by the Government. The decision of the Circuit Court of Appeals below is directly in conflict with the decision of the District Court in the *Carstairs* case.

In the *Carstairs* case the taxpayer, a citizen of the United States, had been a resident of England for many years. It was his custom to make annual trips to the United States for brief periods. In the taxable year in question, which was the calendar year 1928, he had been in the United States during the first seven weeks of 1928. He then returned to England where he died on July 9, 1928. The Government contended that since he was not physically outside the United States for as much as six months during the year 1928, the exemption provided in Section 116(a) was not applicable. The court rejected the Government's contention that physical presence alone was determinative, said that it was necessary to look at all of the facts, and found that the taxpayer had been a bona fide non-resident of the United States for six months in 1928—this in spite of the fact that during a substantial part of that time he had been physically present in the United States. The opinion (by KIRKPATRICK, D. J.) said:

> "If, as the defendant contends, the Committee Report shows that this clause was inserted in relief

* Opinion to be found at 17 A. F. T. R. 1044, paragraph 9075 of the C. C. H. Federal Tax Service for 1936 and paragraph 660 of the Prentice-Hall Tax Service for 1936.

> of salesmen and foreign representatives of American firms, traveling abroad solely for the purposes of their business, it is difficult to see why the statute did not say so, instead of carefully specifying bona fide *nonresidents,* thus excluding by omission residents of this country abroad for a specific and temporary purpose and accomplishing a result the opposite of that which the defendant says was intended.
>
> "But residence means something other than mere physical presence in a particular place. Of course, physical presence for some substantial part of the time is necessary and it may sometimes be a controlling factor (a man who has never been in England cannot have a residence there), but a factor at least equally important is the state of mind of the subject of the inquiry. To ascertain that, his prior and subsequent life is all more or less relevant. * * *."

The Solicitor General announced his decision that no appeal was to be taken by the Government from this unfavorable decision and none was taken.*

Congress has never attempted to define the word "resident" or "non-resident". Nor have the regulations attempted to define the word "non-resident" as used in Section 116(a). Section 211(a) of the Internal Revenue Code, however, provides for the method of taxing a "non-resident alien individual" and the Treasury Department regulations have defined this phrase in Article 211-2 as follows:

> "An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to

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* See paragraph 255 of Volume 1 of the 1936 Prentice-Hall Federal Tax Service.

> time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this article, in the absence of exceptional circumstances."

This article has remained substantially unchanged since Regulations 65 was issued in 1924. It is submitted that the general principles of this regulation should be applied to the word "non-resident" used in Section 116(a).

In fields other than taxation the courts have rejected the argument that the term "residence" as used in a statute means physical presence alone. The courts have held that residence was something different from mere physical presence under the repatriation statutes

> *United States* v. *Humphrey,* 29 F. (2d) 736 (C. C. A. 5th, 1928);

under the voting statutes

> *Kemp* v. *Heebner,* 234 Pac. 1068, 77 Colo. 177 (1925);

under the statutes providing for application for citizenship

> *In re Conis,* 35 F. (2d) 960 (D. C. S. D. N. Y. 1929);

U. S. v. *Dick,* 291 Fed. 420 (D. C. N. D. N. Y. 1923);

United States v. *Rockteschell,* 208 Fed. 530 (C. C. A. 9th, 1913);

under attachment statutes

Kanawha Banking & Trust Company v. *Swisher,* 144 S. E. 294, 105 W. Va. 476 (1928);

Biggers v. *Bank of Ringgold,* 144 S. E. 397, 398, 38 Ga. App. 521 (1928);

Winakur v. *Hazard,* 116 A. 850, 851, 140 Md. 102 (1922);

under a statute authorizing service of process on a "non-resident"

Bigham v. *Foor,* 158 S. E. 548, 201 N. C. 14 (1931);

under a statute providing exemption from garnishment for a "resident"

McDowell v. *Friedman Bros. Shoe Co.,* 115 S. W. 1028, 135 Mo. App. 276 (1909); and

under a statute giving homestead rights

Nelson v. *Griggs County,* 219 N. W. 225, 226, 56 N. D. 729 (1928).

The hearings before, and the reports of, the Ways and Means Committee referred to in the Board's opinion (R. 16) make clear the purpose of the exemption given by Section 116(a). This section was to relieve American citizens resident in foreign countries and engaged therein in the promotion of American foreign trade from tax upon the

income which they earned in the foreign country. Taxpayer was within the spirit as well as the letter of the law. He had given up his home and business in Chicago and had established his home in Paris as representative of an American business. Congress knew that when an American citizen did this he subjected himself to taxation of the country of his residence. Citizens who become "bona fide" residents of a foreign country in the interests of American foreign trade were to be relieved from double taxation.

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 18, 1942.

Appendix.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 22. GROSS INCOME.

* * * * * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * * * *

(3) *Gifts, Bequests, and Devises.*—The value of property acquired by gift, * * *

* * * * * * *

SEC. 25. CREDITS OF INDIVIDUAL AGAINST NET INCOME.

(a) *Credits for Normal Tax Only.*—There shall be allowed for the purpose of the normal tax, but not for the surtax, the following credits against the net income:

* * * * * * *

(3) *Earned Income Credit.*—10 per centum of the amount of the earned net income, but not in excess of 10 per centum of the amount of the net income.

(4) *Earned Income Definitions.*—For the purpose of this section—

(A) "Earned income" means wages, salaries, professional fees, and other amounts received as compensation for personal services actually rendered, but does not include any amount not included in gross income, nor that part of the compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered. * * *

* * * * * * *

SEC. 116. EXCLUSIONS FROM GROSS INCOME.

In addition to the items specified in section 22(b), the following items shall not be included in gross income and shall be exempt from taxation under this title:

(a) *Earned Income From Sources Without United States.*—In the case of an individual citizen of the United States, a bona fide nonresident of the United States for more than six months during the taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

* * * * * * *

SEC. 119. INCOME FROM SOURCES WITHIN UNITED STATES.

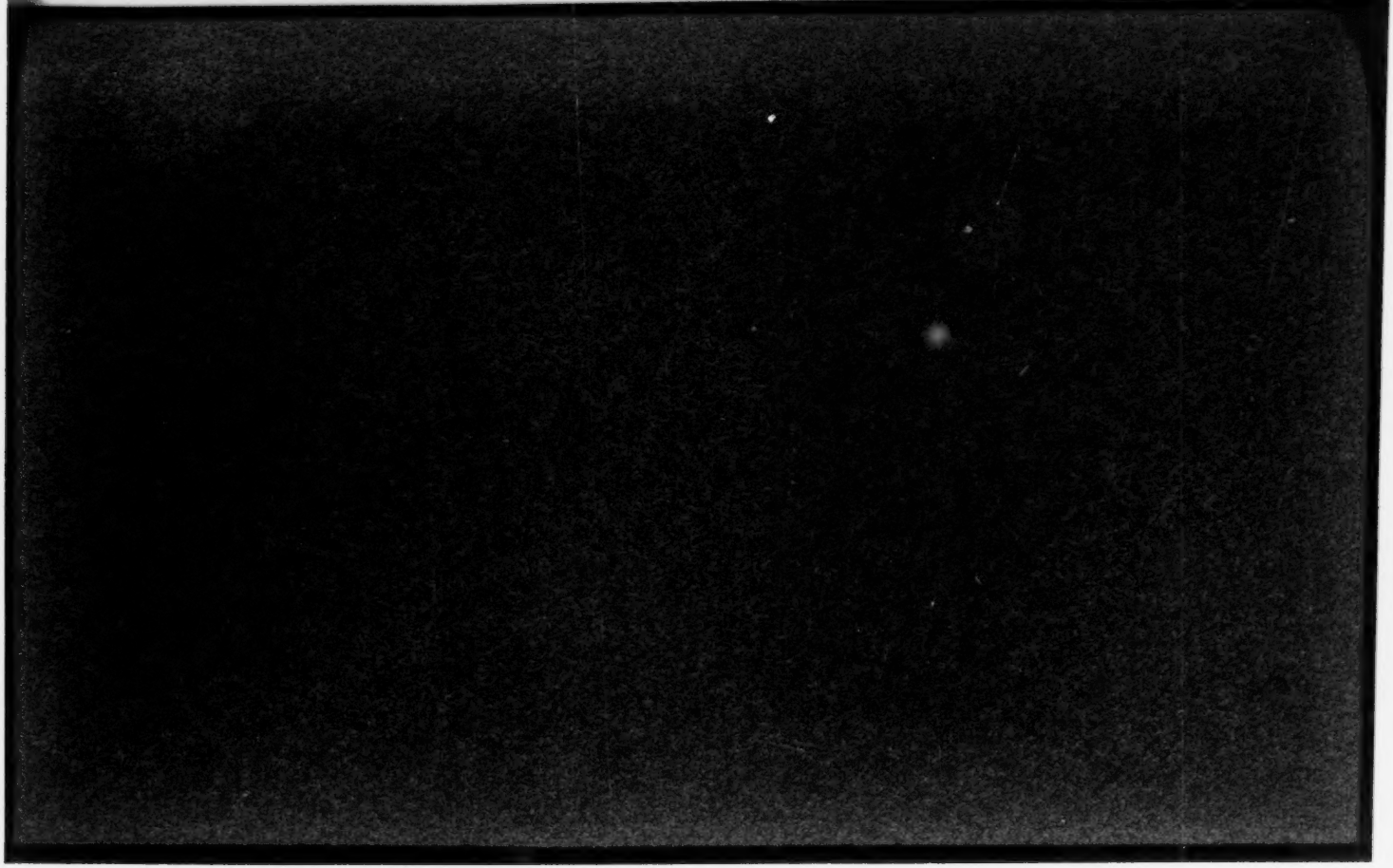
* * * * * * *

(c) *Gross Income From Sources Without United States.*—The following items of gross income shall be treated as income from sources without the United States:

* * * * * * *

(3) Compensation for labor or personal services performed without the United States;

* * * * * * *



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CITATIONS

482201—42

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 328

ESTATE OF W. M. L. FISKE, DECEASED, CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTOR, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 11–20) is reported in 44 B. T. A. 227. The opinion of the Circuit Court of Appeals (R. 34, 42) is reported in 128 F. (2d) 487.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 23, 1942 (R. 42). The petition for a writ of certiorari was filed on August

21, 1942. Jurisdiction of this Court is invoked under section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioner's decedent was a bona fide nonresident citizen for more than six months during the tax year 1936 and therefore entitled to an exemption (for salary paid him) under section 116 (a) of the Revenue Act of 1936.

2. Whether the salary was received from sources without the United States for services performed without the United States as required by sections 116 (a) and 119 (c) (3) of the Revenue Act of 1936.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 116. EXCLUSIONS FROM GROSS INCOME.
>
> In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this title:
>
> (a) *Earned Income From Sources Without United States.*—In the case of an individual citizen of the United States, a bona fide nonresident of the United States for more than six months during the taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25 (a)

if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

* * * * *

SEC. 119. INCOME FROM SOURCES WITHIN UNITED STATES.

* * * * *

(c) *Gross Income From Sources Without United States.*—The following items of gross income shall be treated as income from sources without the United States:

* * * * *

(3) Compensation for labor or personal services performed without the United States;

* * * * *

STATEMENT

The findings of the Board of Tax Appeals (R. 11–14) may be summarized as follows:

Petitioner's decedent, at all times a citizen of the United States (R. 11), resided in Chicago from 1906 until 1924. He was a vice president of Dillon, Read & Company from 1922 until the time of his death, the firm being engaged in the investment banking business, with its principal office in New York, N. Y. He was manager of the Chicago office until he left in 1924 to take charge of the office of the firm in Paris, France,

accompanied by his wife and two children. He continued as manager of the Paris office to the time of his death. (R. 11–12.)

After 1926 the decedent and his wife had resided in an apartment in Paris which was leased for terms of three or more years. A country place about twenty-five miles from Paris was also rented, and decedent and his family occupied it during the summer months and for occasional week ends at other seasons of the year. Both the apartment and the country house were furnished by decedent, who, after 1926, owned no household furnishings in the United States. (R. 12.)[1]

Decedent made four trips to the United States while he resided in France. On the first three he arrived in this country for the Christmas season and returned to Paris in either January or February of the following year. Decedent and his wife again came to the United States in the early part of December, 1935, for the purpose of visiting and spending a short vacation with their daughter and grandchildren at San Mateo, California. The daughter leased a small furnished house for them in San Mateo for a term of three months. They intended to return to Paris at the end of that period and to continue to reside in Paris. (R. 12.)

[1] The apartment in Paris was occupied by servants during the absence in 1936 of decedent and his wife, as was also the country place. Both places were ready for occupancy by the decedent and his wife whenever they should return. (R. 13.)

Decedent, shortly after his arrival in California, in January 1936, became seriously ill from an acute heart condition and high blood pressure. He was forced to go to a hospital for treatment. He remained in the hospital for several weeks and thereafter, until October 1936, was cared for in the house at San Mateo. His doctor did not allow him to do work of any kind. He and his wife left California in October 1936, for New York, where they intended to sail for Paris. He had a recurrence of the illness when he reached New York, and was not able to return to Paris until March 1937. He was continuously under the care of doctors and was completely incapacitated from working during his entire stay in the United States. He was within the territorial boundaries of the United States at all times during the year 1936, and performed no service of any kind for Dillon, Read & Company during that year. (R. 12–13.) The firm paid him $37,400 during 1936 as salary for that year (R. 13).[2]

Decedent resumed his duties as manager of the Paris office when he returned to Paris in 1937, and continued those duties until May, 1940, when he left Paris and returned to the United States. He received news in August, 1940, that his son, a member of the British Royal Air Force, had been killed in action on August 17, 1940, and at that

[2] Decedent received substantially the same amount as salary in years prior and subsequent to 1936 (R. 13).

time he decided to reside permanently in the United States, making plans to have his household furnishings moved from France to this country. (R. 13.)[3]

While absent from the United States decedent always used a United States passport. He had his passports renewed from time to time. He applied for a passport in November 1936; on that application, after the printed words "I am domiciled in the United States, my permanent residence being at", he inserted the following: "134 So. La Salle St., Chicago, Illinois", and underneath that: "Waldorf-Astoria Hotel, N. Y. C." He also stated on that application that he intended to leave the United States on November 18, 1936, to visit Europe for the purposes of business and pleasure, and that he intended to return to the United States within an indefinite number of years. His last previous application for a passport had been made in September 1932. The printed form of that passport contained the words "My legal residence is at", and there was inserted after those words on the application: "134 South La Salle St., Chicago, Ill." Several of the applications contain a statement that decedent

[3] Decedent died in New York, N. Y., on October 5, 1940. His will was probated in New York County as that of a resident of the county, and letters testamentary were granted to the Central Hanover Bank & Trust Company. (R. 11.)

had been residing in France since 1924 and that he was engaged in business there. (R. 13–14.)

Decedent owned a number of securities which were kept for him by custodians in the United States, the income being received for him by his former secretary in Chicago. She did not have custody of the securities, but had partial use of an office at 134 South La Salle Street, Chicago, where she carried on the activities intrusted to her and kept records pertaining to his securities. She prepared annual income-tax returns for him and gave that office as his address. These returns were audited by a firm of accountants and sent to decedent for execution. The returns for the years up to and including 1936 were filed with the Collector of Internal Revenue at Chicago. Thereafter, they were filed with the Collector at Baltimore. (R. 14.)

The Commissioner determined a deficiency in income tax for 1936; he ruled that the salary of $37,400 received by decedent from Dillon, Read & Company in that year was not to be excluded from gross income under section 116 (a) of the Revenue Act of 1936 (R. 14). The Board of Tax Appeals, one member dissenting, held that decedent was a bona fide nonresident of the United States during all of the year 1936 and that the salary received was not taxable (R. 14).

The Circuit Court of Appeals reversed (R. 42). Judge Major dissented (R. 38).

ARGUMENT

For exclusion of salary from gross income the statute expressly requires (1) that the taxpayer be a bona fide nonresident of the United States for more than six months during the taxable year, and (2) that the amounts received be from sources without the United States, the latter being defined as compensation for services performed without the United States. Failure to meet either requirement is fatal to the claim.

The purpose of the exclusion, which was first provided in the Revenue Act of 1926 by section 213 (b) (14), was to stimulate foreign trade and to relieve American citizens, resident in a foreign country, from double taxation upon income earned abroad if the earner was actually engaged in foreign trade as a nonresident for more than six months of the taxable year. See H. Rep. No. 1, 69th Cong., 1st Sess., p. 7 (1939–1 Cum. Bull. (Part 2) 315, 320); S. Rep. No. 52, 69th Cong., 1st Sess., pp. 20–21 (1939–1 Cum. Bull. (Part 2) 332, 348).[4] Petitioner makes no showing of a

[4] The Bureau of Internal Revenue has consistently applied the statute to any American citizen actually employed outside the United States for over six months during the taxable year. G. C. M. 9848, X–2 Cum. Bull. 178, 179 (1931); S. M. 5446, V–1 Cum. Bull. 49 (1926); G. C. M. 22065, 1940–1 Cum. Bull. 100; I. T. 3259, 1939–1 Cum. Bull. 127, 128.

case brought within the underlying purpose of the statute, but merely a technical claim to exemption from all income tax with respect to decedent's 1936 salary.

Decedent was a United States citizen who lived in the United States during all of the tax year and performed no services outside the United States during that year. The court below was therefore warranted in ruling against petitioner, on the theory that, for purposes of the exclusion, residence was the place of abode, whether permanent or temporary, and that Congress was not so much concerned with the permanent residence as with the fact of six months' actual nonresidence for engaging in business outside the United States during the taxable year. Although that determination was sufficient to dispose of the case, the court below also held that petitioner had failed to prove that the payment was for services rendered outside of the United States (R. 38). Since decedent was in the United States during the entire year and performed no services for Dillon, Read & Company, the court reached a proper conclusion.

The decision below does not conflict, as alleged (Pet. 8–10), with *Muhleman* v. *Hoey,* 124 F. (2d) 414 (C. C. A. 2), or *Lucas* v. *Ox Fibre Brush Co.,* 281 U. S. 115, on the question whether it is necessary that the services for which the compensation

was paid be rendered during the taxable year. The Board of Tax Appeals here found as a fact that the amount involved was paid "during the year 1936 as salary for that year" (R. 13). Upon that finding the inquiry was necessarily limited to the place where the services for 1936 were rendered (see R. 37–38).

Although petitioner asserts a conflict also with *Penfield* v. *Chesapeake, Ohio & Southwestern R. R.*, 134 U. S. 351 (Pet. 4), the brief in support of the petition states that the case is not in point (Pet. 12). This is followed by an assertion (Pet. 14) that the decision below and the *Penfield* case are probably in conflict or that at least the authority of the *Penfield* case has been improperly extended. That decision held that a person did not acquire a New York residence for the purpose of a state statute of limitations prior to the time when he took up an abode there. Petitioner contends additionally that the holding of the Circuit Court of Appeals is "perhaps also in conflict with *Texas* v. *Florida*, 306 U. S. 398, and *District of Columbia* v. *Murphy*, 314 U. S. 441" (Pet. 4). It is plain that the questions involved in those decisions and the *Penfield* case differ intrinsically from the issue raised in the present case concerning the meaning of the term "nonresident" used in section 116 (a) of the Revenue Act.

CONCLUSION

There is no conflict and the questions presented are not of general importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1942.

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No. 328

Supreme Court of the United States

OCTOBER TERM, 1942.

ESTATE OF W. M. L. FISKE, Deceased, CENTRAL HANOVER BANK AND TRUST COMPANY, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Respondent's brief relies in part (pp. 8, 9) upon the legislative history of what is now Section 116(a) of the Internal Revenue Code and on an alleged consistent construction of Section 116(a) by the Bureau of Internal Revenue. These arguments go to the merits of the instant controversy, rather than to the question of whether the petition for certiorari should be granted.

There is no need for recourse to Bureau construction and legislative history when the statutory provision to be interpreted is as clear and unambiguous as Section 116(a). The opinion in *Carstairs* v. *U. S.* (cited at p. 19 of the petitioner's main brief) commented upon a similar contention by the Government in that case, as follows:

> "If, as the defendant contends, the Committee Report shows that this clause was inserted in relief

> of salesmen and foreign representatives of American firms, travelling abroad solely for the purposes of their business, it is difficult to see why the statute did not say so, instead of carefully specifying bona fide *nonresidents,* thus excluding by omission residents of this country abroad for a specific and temporary purpose and accomplishing a result the opposite of that which the defendant says was intended." (Italics Court's.)

Moreover, it is submitted that the opinion of the Board of Tax Appeals below properly disposed of these arguments as follows (R. 15-17):

> "Looking to the context and the purpose of the staute to discover the meaning of the phrase 'bona fide nonresident of the United States for more than six months during the taxable year', we do not discover much that is helpful." * * *
>
> "The Bureau rulings are neither clear nor controlling on the question of what was meant by 'bona fide nonresident.' The exemption has been held applicable in the rulings, provided that the citizen was merely absent from the United States for more than six months during a taxable year, but it is quite another thing to say that it does not apply unless the person has been absent from the United States for more than six months during a taxable year."

II.

Respondent's brief states (p. 9):

> "* * * the court below also held that petitioner had failed to prove that the payment was for services rendered outside of the United States (R. 38)."

It is submitted that the Court below rather held that the petitioner had failed to prove that the payment was for

services rendered (outside of the United States) *during the taxable year 1936* (R. 38, 41).

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 17, 1942.